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RESPONSE REQUESTED 2

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No. 90-5635 3

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN J. MCCARTHY,

Petitioner,

v.

GEORGE BRONSON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

9
RESPONDENTS' BRIEF
IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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FILED

NOV 16 1990

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QUESTIONS PRESENTED

1. Does a signed written consent to a bench trial before a United States Magistrate, constitute a stipulation to trial by the court sitting without a jury pursuant to Rule 39(a)(1) and 28 U.S.C. 636(c)?

2. May a state prisoner at the commencement of the bench trial before the Magistrate unilaterally withdraw his consent, thereby depriving the Magistrate of jurisdiction to conduct the trial?

3. Is a prisoner's complaint under 42 U.S.C. § 1983 against prison officials a prisoner petition challenging conditions of confinement within the meaning of 28 U.S.C. § 636(b)(1)(B) so as to authorize the Magistrate to conduct evidentiary hearings on the merits of the case and file a report entitled "Recommended Findings of Fact and Memorandum of Decision."?

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RESPONDENTS' BRIEF
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The respondents, George Bronson, Steven Tozier, Paul Lusa, and Fred Mickiewicz, all present or former state prison officials and employees of the Connecticut Department of Correction, pursuant to Supreme Court Rule 15.1, submit this brief in opposition to the writ of certiorari, calling to the Court's attention misstatements of fact or law which compel the denial of the petition in this case. The respondent prison officials respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the

Second Circuit. That opinion is reported at 806 F.2d 835 (2d Cir. 1990).

The alleged conflict upon which the petitioner relies is illusory and this Court must "be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 79 (1955) citing from Layne & Bowler Corp. v. Western Well Works Inc., 261 U.S. 387, 393 (1916).

For the reasons discussed below, the petition for a writ of certiorari should be denied.

RESPONDENTS' COUNTER STATEMENT

This case involves far more than one specific episode of alleged unconstitutional conduct. McCarthy brought this action pursuant to 42 U.S.C. § 1983 challenging various aspects of his conditions of confinement while incarcerated at the Connecticut Correctional Institution at Somers, (CCIS). He named as one of the defendants George Bronson, who was warden of CCIS at the time of the events alleged. McCarthy alleged that the warden was responsible for the establishment of ongoing prison practices and regulations with regard to his placement in segregation. (Second Amended Complaint, ¶¶ 53, 55) including his classification and assignment to the "death cell", (see Findings of Fact ¶¶ 2, 61-63, Appendix 5, p. A13, A23) as well his exposure to unsafe living

conditions in the segregation unit, unnecessary exposure to violence prone inmates and cruel and unusual punishment by prison authorities. (Second Amended Complaint, ¶ 22) (Appendix 9)

McCarthy further alleged that there was an ongoing pattern or practice of use of chemical agents by correction officers against inmates solely to punish inmates and to inflict unnecessary pain and suffering. He claimed that the prison's written policies and procedures for the use of force against inmates, including the use of chemical agents, were deficient and that this deficiency was a substantial factor which authorized the use of the tear gas duster against him on July 13, 1982. (Second Amended Complaint, ¶¶ 17, 27, 28, 30, 31, 42) Lengthy testimony and documentary evidence was offered at trial regarding these alleged conditions of confinement. See e.g. Findings of Fact ¶¶ 56, 57, Appendix 5, p. A22.

On April 11, 1983, McCarthy filed his original pro se complaint. After reviewing the complaint, Judge Cabranes, the district court judge to whom the case had been assigned, referred the case sua sponte to Magistrate Eagan pursuant to 28 U.S.C. §§ 636(b)(1) (A) & (B). On February 28, 1985, the parties consented to have the case tried by the Magistrate in a bench trial to be held at CCIS. On March 5, 1985, Judge Cabranes entered an Order of Reference which directed Magistrate Eagan to conduct all further proceedings including the entry of judgment in accordance with Title 28 U.S.C. § 636(c) and the consent of the parties.

On March 24, 1988, the first day of trial, the Magistrate, apparently having forgotten that the parties had signed the consent

to a bench trial more than three years earlier, again offered the consent form to the parties for signature.¹ McCarthy refused to sign a second consent form. The Magistrate informed McCarthy that by refusing to sign he could not change the identity of the judicial officer who would hear the case. The only difference was that the Magistrate would be the recommended fact finder and not the final fact finder. Tr. 3/24/88 at 3-6. (Appendix 10)

On May 29, 1989, Magistrate Eagan issued his "Recommended Findings of Fact and Memorandum of Decision" which was endorsed by Judge Cabranes on June 19, 1989. See copy attached, Appendix 5. The findings of fact set forth in the Magistrate's recommended ruling are wholly incorporated by reference herein. Various post-judgment motions were filed by both parties. Judge Cabranes thereafter conducted a thorough de novo review of the transcripts and on August 17, 1989, he issued a Ruling on Pending Motions. Copy attached, Appendix 8.

On appeal, the United States Court of Appeals for the Second Circuit affirmed. McCarthy v. Bronson, 906 F.2d 835 (2d Cir. 1990). The Second Circuit held that the Magistrate was not required to take a narrow view of his authority and "[w]ith complete propriety he could have declined to vacate the 636(c) consent and adjudicated the merits definitively." Id. 906 F.2d at

¹ The respondents claim this inadvertent lapse was procedural, Archie v. Christian, 808 F.2d 1132, 1134-35 (5th Cir. 1987). Further, any other course by the magistrate would permit a prisoner to engage in "magistrate shopping" or "judge shopping". See Ruling on Pending Motions, August 17, 1989; Appendix 8 at p. A40; Fellman v. Fireman's Fund Insurance Co., 735 F.2d 55, 57-58 (2d Cir. 1984).

839. "The parties February 28, 1985 consent to have the matter tried by the Magistrate was entirely valid." Id. at 838.

In addition to money damages, McCarthy was seeking declaratory and injunctive relief to correct what he perceived to be unconstitutional prison policies and practices. (Second Amended Complaint, Sec. V. at pp. 8-9) Accordingly, he named the warden as a defendant, in his official capacity only, so he would be able to implement any injunctive relief the court might have ordered had he prevailed on the merits. Under the facts and circumstances of this case, the Second Circuit's decision below was entirely correct, and the petition should be denied.

ARGUMENT

I. MCCARTHY'S ACTION EASILY FALLS INTO THE CATEGORY OF PRISONER PETITIONS CHALLENGING CONDITIONS OF CONFINEMENT

In Hill v. Jenkins, 603 F.2d 1256, 1260 (7th Cir. 1979),² Judge Swygert, in his concurring opinion, described conditions of confinement as "ongoing prison practices and regulations with regard to matters such as placement in maximum security, deadlocks, unhealthy living conditions, unnecessary exposure to violence-prone inmates, overcrowded physical environments, and cruel and unusual punishment by prison authorities." McCarthy's action challenged his classification to administrative segregation and his assignment

² To the extent Hill v. Jenkins relies on United States v. Raddatz, 592 F.2d 976 (7th Cir. 1979), it is in error. Hill v. Jenkins was decided prior to United States v. Raddatz, 447 U.S. 667 (1980), which requires the district judge to conduct "a de novo determination," Id. at 674, which was not done in Hill, and upheld the constitutionality of the Magistrates Act.

to the "death cell". His refusal to follow orders to pack his personal property and change cells was based on his perception that he would be unnecessarily exposed to violence-prone inmates. His challenge to the use of the tear gas duster was not based only on a single specific incident, but also was based on the alleged failure to have adequate policies and procedures so as to prevent the wanton use of chemical agents by correction officers who McCarthy alleged were inflicting cruel and unusual punishment. McCarthy further challenged the procedure for searching his cell after he had been removed from the area and claimed that the shank (prison-made knife) which was found in his property was planted. He challenged the disciplinary reports he received and the fact that these reports resulted in lengthier confinement in administrative segregation. He also challenged the adequacy of medical treatment he received. (Second Amended Complaint, 11 36-39)³ Under the standard set forth by Judge Swygert in Hill v. Jenkins, supra, McCarthy's action can easily be classified a "prisoner petition challenging the conditions of confinement". Without question, McCarthy's action challenged the ongoing policies and procedures of CCIS. Accordingly, the reference to the Magistrate was authorized by section 636(b)(1)(B).

Hill v. Jenkins, supra, is not to the contrary. In that case a prisoner alleged that he lost some personal property as a result of a prison shakedown. Such an allegation fails to even state a

³ The majority in Clark v. Poulton recognizes that an allegation of denial of medical treatment does challenge conditions of confinement. Majority slip. op. at 20, n.8.

cause of action under § 1983. See, Hudson v. Palmer, 468 U.S. 517 (1984).⁴

In Orpiano v. Johnson, 687 F.2d 44 (4th Cir. 1982), a section 1983 claim that the inmate plaintiff was misled into believing charges would be dropped, challenged the administrative procedures under which the charges were brought and was held to be a prisoner petition challenging conditions of confinement. The inmate in Orpiano, like McCarthy, spent time in isolation and had a reduced chance for a transfer. The Fourth Circuit held that such a prisoner complaint was properly referred without consent pursuant to section 636(b)(1)(B). Id. at 46.

There is no need for this Court to reach the question raised by the petitioner in this case.

A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But the Court does not sit to satisfy a scholarly interest in such issues. Nor does it set for the benefit of particular litigants.

Rice v. Sioux City Memorial Park Cemetery, supra, 349 U.S. at 74.

The Court has a duty to avoid decision of constitutional issues.

Id. See also, Gomez v. United States, 109 S.Ct. 2237, 2241 (1989) (citing cases)

⁴ In Hill v. Jenkins, there was no consent of the parties, no local rule permitting a magistrate to preside over a civil trial and no de novo review. Id. 603 F.2d at 1258. Similarly in Clark v. Poulton, the District of Utah had no local rule permitting reference to a magistrate for a civil trial. Clark (majority) slip. op. at 13 n.6.

Because a reasonable interpretation of McCarthy's § 1983 complaint is that it is a prisoner petition challenging conditions of confinement, the Court should avoid reaching the merits of petitioner's academic question, i.e. is a single incident a "condition of confinement", and should deny the petition.

II. THE INTERCIRCUIT CONFLICT NOTED BY PETITIONER IS ILLUSORY

The petitioner not only mischaracterizes his action as alleging only a "specific episode of unconstitutional conduct" but also misrepresents what he perceives as an irreconcilable intercircuit conflict. On closer examination, the only decision which is at odds with the decision below is Clark v. Poulton, et al, No. 88-1177, 1990 U.S. App. LEXIS 16625 (10th Cir. Sept. 21, 1990). The Clark decision is easily distinguishable from the McCarthy decision below.

The prisoner in Clark had never consented to proceed before a United States Magistrate and "neither the district court nor the magistrate [] purported to act pursuant to that provision [636(c)]." Clark, majority slip. op. at 12. Further, in Clark, the Tenth Circuit noted that the Local Rules for the District of Utah contain "no provision for the reference of civil trials to a magistrate." In McCarthy's case, the Local Rules for the District of Connecticut coincide with the same broad expansion of the Magistrate's authority envisioned by P.L. 94-577. See Legislative History, attached hereto, Appendix 11, 1976 U.S. Code Cong. &

Admin. News 6162-173.⁵ In at least two places, the House report refers to "prisoner petitions brought under section 1983 of title 42 U.S. Code." Id. at 6166, 6171. A distinction between the actions exists based on McCarthy's challenge to a number of ongoing prison practices, as opposed to Clark's challenge to two isolated events, one of which occurred before Clark was even admitted to the jail. Clark majority slip. op. at 8.

The Clark majority's reliance on Houghton v. Osborne, 834 F.2d 745, 749 (9th Cir. 1987); Hall v. Sharpe, 812 F.2d 644, 647 n.1 (11th Cir. 1987); Wimmer v. Cook, 774 F.2d 68, 74 n.9 (4th Cir. 1985); and Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982) is misplaced. Clark, majority slip. op. at 8. None of these decisions is embarrassingly at odds with the Second Circuit's decision below. The petitioner's claim that the Fourth, Ninth, Tenth and Eleventh Circuits are in conflict with the Second Circuit's decision below is based on a misreading of those cases and is thoughtfully discussed in Judge Anderson's dissenting opinion in Clark. See dissent slip. op. at 1, n.1, 2, n.2.⁶ The

⁵ The petitioner asserts that there is no need to resort to the legislative history because the plain meaning of "condition" is clear. Respondents refute this assertion and contend that "condition" can have a wide variety of definitions, many of which involve a single, specific event such as set forth in 8 Words and Phrases. (attached hereto, Appendix 12) A "condition" is "a future and uncertain event..." Black's Law Dictionary, 265 (5th ed. 1979), (Appendix 13)

⁶ Judge Anderson is entirely correct when he states that the majority opinion in Clark leads to absurd results. Slip. op. (dissent) at 2-3. Magistrate Eagan tried the class action overcrowding case at the Hartford Correctional Center over a

Footnote continued on next page.

Fourth Circuit is not at odds with the decision below. In Wimmer v. Cook, 774 F.2d 70, 74 (4th Cir. 1985), the inmate plaintiff conceded the judge was empowered to refer the case to the magistrate without consent. The problem there involved conducting a jury trial without consent. Hall v. Sharpe, 812 F.2d 644, 647 n.1 (11th Cir. 1987) involved a single incident, and was reversed not because of an improper referral under § 636(b)(1)(B), but because there was no consent to a jury trial.

The Eighth Circuit in Thompson v. Nix, 897 F.2d 356, 357 (8th Cir. 1990), held that 28 U.S.C. § 636(b)(1)(B) authorized reference to a magistrate to hear a prisoner's allegation he was assaulted on two occasions. (Magistrate's report vacated for plain error and lack of de novo review).

McCarthy's case and the Second Circuit's decision below is not in conflict with decisions from other Circuit courts of Appeals and fits squarely within the clear meaning of 28 U.S.C. § 636(b)(1)(B).

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Footnote continued from previous page.

period of 18 days. Lareau v. Manson, 651 F.2d 96, 98 (3d Cir. 1981); it is absurd to claim he could not hear an individual inmate's case.

Respectfully submitted,

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CERTIFICATION

I hereby certify that I am a member of the bar of this Court and a copy of the foregoing brief in opposition and attached appendix was mailed this 15th day of November, 1990 to:

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